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Supreme Court, U.S.
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No. 02-561

In The

Supreme Court of the United States

HARRY BROWNE and PETER SCHMERL,

Petitioners,

v.

BETSEY BAYLESS, Secretary of State of Arizona,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Arizona's nomination petition filing deadline for an independent candidate running for President of the United States, which fell on June 14, 2000, unconstitutionally burden the First and Fourteenth Amendment rights of the Libertarian Party's nominee for President who, because of an intra-party struggle for control of the Arizona Libertarian Party, filed his nominating petitions to run as an independent on August 17, 2000?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Arizona Secretary of State Betsey Bayless, respectfully requests that this Court deny Harry Browne's and Peter Schmerl's Petition for a Writ of Certiorari seeking review of the Arizona Supreme Court's decision in this case.

STATEMENT OF THE CASE

This case concerns Arizona's filing deadline for independent presidential candidates, which the Arizona Supreme Court unanimously held was constitutional under the test in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The Arizona court found that Arizona's filing deadline did not impose a suspect or severe burden on the rights of independent voters because it was significantly closer to the date of the general election than the Ohio deadline struck down in *Anderson*. In addition, the court found Petitioner Browne's exclusion from the ballot was not caused by a filing deadline that discriminated against independents but by his failed attempt to be nominated by his party in Arizona. (Pet. App. 7a-8a). The court then determined that the filing deadline was rationally related to Arizona's important regulatory interests. (*Id.* at 10a-11a.)

The Arizona decision presents no reason for this Court to revisit *Anderson*. The decision is consistent with *Anderson* and the Court's subsequent ballot-access decisions. It does not conflict with another federal or state court decision. Finally, except for Browne, who filed too late because he failed in his attempt to be the Arizona Libertarian

nominee, Petitioners have not demonstrated that Arizona's deadline has prevented any national presidential candidate from obtaining ballot access.

A. Factual Background

In early 2000, Browne began his campaign for president in Arizona as a candidate of the Libertarian Party. (Pet. App. 3a.) However, the Arizona electors that supported Browne's nomination as the Libertarian Party presidential candidate, led by Petitioner Peter Schmerl, were enmeshed in an intra-party struggle for control of the Libertarian Party. (*See* Defs' Answering Brief at 5, *Browne v. Bayless*, No. 1 CA-CV 00-0546, Ariz. Ct. of App., filed March 2, 2001.) Mr. Schmerl asserted that he was the true Libertarian Party state committee chair and initiated at least two lawsuits seeking a court order to that effect. (*Id.*) As of June 14, 2000, the Maricopa County Superior Court had ruled that Mr. Schmerl was not the Libertarian Party chair. (*Id.*) Therefore, the Secretary of State refused Schmerl's petition nominating Browne as the Libertarian candidate and accepted those of the person whom the court held to be the recognized chair. (I.R.A. 6, Ex. 21; Pet. App. 35a, 48a.)

On July 2, 2000, the Libertarian Party nominated Browne for president at its national convention. (Pet. App. 3a.) Having failed to obtain his party's Arizona nomination, however, Browne attempted to file his designation of presidential electors and nominating petitions as an independent candidate with the Secretary of State on August 17, 2000. (I.R.A. 6, Ex. 20; *see also* IR 1, ¶ 13.) The Secretary of State refused to accept Browne's petitions because they were not timely. (*Id.*, Ex. 18.)

In Arizona, an independent candidate for president must obtain a specific number of signatures and file them with a petition listing the presidential electors that would vote for the candidate at the same time that new or recognized party candidates must file their slate of electors, without identifying their candidates. Ariz. Rev. Stat. Ann. (A.R.S.) § 16-341. Recognized party candidates must file their slate of electors "not less than ninety nor more than one hundred and twenty days before the primary election." A.R.S. § 16-311. In 2000, the deadline for filing nomination petitions was June 14, 2000. (Pet. App. 41a.)

The deadline for filing nominating petitions is necessary to allow the Arizona Supreme Court to resolve election challenges and the Secretary of State to prepare and print the final ballot in time for Arizona's early voting. (*Id.* at 10a-11a, 41a to 47a). Indeed, in 1999, the Arizona Legislature amended the filing deadline from seventy-five to ninety days to allow time to investigate, hear, and resolve election challenges. (1999 Ariz. Sess. Laws, Ch. 224, § 1; *see also* Pet. App. 45a).

B. Procedural Background

Petitioners Browne and Schmerl and one of Browne's prospective electors challenged the Secretary of State's refusal of Browne's nominating petition in a lawsuit alleging that the filing deadline was unconstitutional. (I.R.A. 1.) The Complaint requested declaratory and injunctive relief. *Id.*

The Superior Court for Maricopa County denied relief. (Pet. App. 25a-28a.) The court applied the *Anderson* test and found that Arizona's filing deadline did not impose a

severe burden on Petitioners' First and Fourteenth Amendment rights and that the State had sustained its burden of demonstrating a rational basis for the deadline. (*Id.* at 27a-28a.) The court noted Arizona's "greater and more widespread use of early balloting" and "the substantial administrative burden imposed upon election officials and the courts in carrying out the challenge process." (*Id.* at 28a.) The Arizona Court of Appeals reversed for the reasons stated in the Petition for Certiorari. (*Id.* at 13a-24a.)

The Arizona Supreme Court vacated the Arizona Court of Appeal's decision and, applying the test in *Anderson*, concluded that Arizona's filing deadline does not impose suspect or severe restrictions on Browne's First Amendment rights and furthers important regulatory interests of the State. (Pet. App. 2a.)

REASONS TO DENY THE PETITION

1. The Arizona Supreme Court Correctly Applied the Law in *Anderson* to the Facts Before It.

Petitioners argue that the Arizona Supreme Court "misapplied *Anderson*." (Pet. at 15.) There is no need to review the Arizona decision because the court correctly stated the rule of law in *Anderson* and applied that rule correctly.

As Petitioners acknowledge (Pet. at 15-16), the Arizona Supreme Court recognized that the *Anderson* test applied to Petitioners' challenge and correctly set forth the test. (Pet. App. 5a-6a.) The Court rarely grants review in these circumstances. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the

asserted error consists of . . . the misapplication of a properly stated rule of law.")

Moreover, the Arizona Supreme Court correctly applied the law in *Anderson* to the facts before it. The court held that the Ohio deadline in *Anderson* was significantly different from Arizona's deadline because it is 83 days closer to the general election and Arizona allows early balloting, which effectively starts the selection 33 days prior to election day. (Pet. App. 7a.) Thus, the effective period between the filing deadline and the election in Arizona is 113 days, compared with 229 days in Ohio. (*Id.*)[1]

In addition, the court noted Arizona's June filing deadline did not raise the concerns present in *Anderson* because the national political process has evolved towards a system whereby the identities and positions of the major party candidates are now largely determined before June. (*Id.* at 7-8.) Thus, the concern in *Anderson* that independent voters disaffected from existing political parties would not have sufficient time to coalesce into viable groups was not present in this case. (*Id.*) The court noted that this concern was not present because Browne was a member of the Libertarian Party in Arizona at least as late as June 14, 2000, and decided to run as an independent "only because he lost the internal party dispute – and not in response to events transpiring within the major political

[1] Petitioners erroneously suggest that, because Anderson did not have to collect signatures before Ohio's March deadline, the Court miscalculated the difference between the two deadlines. (Pet. 19-20 n.11.) Anderson collected approximately 14,500 signatures in Ohio. *Anderson*, 460 U.S. at 782. Thus, the Arizona Supreme Court correctly calculated how the Arizona deadline differed from the Ohio deadline.

parties." (*Id.* at 8a.) The court thus concluded that the deadline did not impose a "suspect burden" on the rights of independent voters. *Id.*

The court then analyzed the State's interest to determine if the restrictions were reasonable and nondiscriminatory. (*Id.* at 9a.) The State showed that it needed the time to prepare early ballots, sample ballots, and ballots for overseas voters not later than 33 days before the date of the general election, to prepare and print ballots that could be optically scanned, to translate the ballots into numerous Native American languages in order to comply with the Voting Rights Act, and to complete administrative and judicial review of election challenges. (*Id.* at 9a-11a.) The court concluded that "[w]hile the Secretary of State may not need the entire period of time allowed under § 16-351 [sic] [§ 16-341] to complete her duties in every election year, additional time clearly is necessary when electoral challenges and related court proceedings occur." (*Id.*)

Petitioners argue that the difference between the Ohio deadline and the Arizona deadline is not significant but cite no authority other than the language of *Anderson*. In fact, *Anderson* supports the court's conclusion. Anderson's supporters tendered a nominating petition containing approximately 14,500 signatures and a statement of candidacy to the Ohio Secretary of State on May 16, 1980. *Anderson*, 460 U.S. at 782. Although filed after Ohio's March 20, 1980 deadline, the documents would easily have satisfied Arizona's deadline. *Id.* This Court did not find a June filing deadline problematic. It noted that the deadlines in a number of states are in June or July. *Id.* at 795 n.20. Thus, the Arizona Supreme Court correctly

concluded that the Arizona statutory deadline was significantly different than the Ohio statute struck down in *Anderson*.

Petitioners also argue that the Arizona court incorrectly found that, unlike the facts in *Anderson*, independent voters were not affected by the State's rejection of Browne's nomination petition. (Pet. at 19 n.12.) However, the Petitioners' only support is their speculation that "Arizona's presidential ballot access scheme is not sufficiently flexible to accommodate developments in the political party nominating process." (*Id.*) Petitioners do not argue that in 2000 the June 14 deadline was invalid because the identities of the recognized party candidates were still unknown or likely to change. Thus, Petitioners' arguments are based purely on hypothetical burdens that they did not suffer. They have not shown that the deadline created such burdens for any other independent or minor-party candidate in Arizona.

Petitioners' argument also fails to recognize that this Court is concerned about the burden on independent voters, not party candidates who fail to garner the support of the electors in a single state. *See Burdick v. Takushi*, 504 U.S. 428, 437 (1992) (stating that the Court "gave little weight to 'the interests the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status'") (quoting *Storer v. Brown*, 415 U.S. 724, 736 (1974)).

Finally, Petitioners' argument that the petition filing deadline discriminates in favor of parties fails because

they ignore the real and substantial differences between party and independent candidates.[2] The Arizona Supreme Court correctly recognized that the national political process has evolved toward a system of ever-earlier presidential primary elections with the result that, by the middle of June in an election year, the identities and positions of the major party candidates have largely been determined. (Pet. App. 7a-8a.) Similarly, in *Hagelin for President Comm. v. Graves*, 25 F.3d 956, 960 (10th Cir. 1994), the Court of Appeals for the Tenth Circuit rejected the argument that Kansas's filing deadline was advantageous to major parties because it imposed no time limits on them to submit the names of their presidential nominees. *Id.*[3] Unlike independent candidates, party candidates must survive a primary and a national convention for their names to appear on the ballot. *Id.* Moreover, while an independent candidate can have his or her name placed on the ballot without any public exposure, the same cannot be

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[2] Browne manufactures an argument that the calculation of Arizona's filing deadline is somehow flawed because it is tied to Arizona's primary election in which independents do not participate. (Pet. at 20.) The fact is, however, that the deadline was calculated to allow the election officials enough time to prepare the general election ballot and for the courts to resolve any challenges to independent candidacies. Calculating the deadline based on the primary election was just one way of setting the deadline. The Legislature could have arrived at the same date based on the general election.

[3] In fact, the identities of the major parties' candidates on the general election ballot may actually be finalized at approximately the same time as an independent candidate is assured of a place on the ballot. When the time for challenging nominating petitions is taken into account, an independent may only be fully qualified for the ballot in early to mid-August, approximately the same time the major parties hold their conventions to formally nominate their candidates. *See* A.R.S. § 16-351.

said for the major party candidates. *Id.* at 960; *Anderson*, 460 U.S. at 816 ("On the whole, party candidates have a more difficult chore in getting a place on the general election ballot than do nonparty candidates.") (Rehnquist, J., dissenting). The Arizona court correctly concluded that the deadline in A.R.S. § 16-341 did not impose a suspect or severe burden on independent voters.

Petitioners also take issue with the lower court's analysis of the State's interests. However, they erroneously assert that the court considered a state interest of equal treatment. (Pet. at 20.) The State did not raise, and the lower court did not discuss, this interest.

Petitioners do not dispute the importance of the State's interest in having adequate time to prepare and print ballots and to allow for resolution of legal challenges to petitions. (Pet. at 21.) Petitioners simply argue that the tasks do not require the amount of time provided by the Legislature.[4] This argument fails because this Court does not require the State to determine with exact precision the time needed before a general election to complete its administrative and judicial tasks. Rather, it is within the Legislature's discretion to use its foresight to establish a filing deadline that will allow the election officials time to prepare for the election and the courts time to resolve any

[4] It is undisputed that an August 17th filing date (the date that Browne's petitions were ready) would not provide sufficient time for the court to resolve election disputes and the Secretary of State to prepare and print the ballots. (Pet. App. 46a-47a.) Moreover, according to Petitioners' own expert, Browne's August 17th petition would have been untimely in twenty-seven other States. (Pet. App. 59a.) Thus, the Petition clearly does not present facts that warrant the Court's revisiting the issue of what is an unnecessarily burdensome filing date.

challenges. This Court has rejected the need for such precision:

> The State's asserted regulatory interests need only be "sufficiently weighty to justify the limitation" imposed on the party's rights. [citations omitted.] Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications. *See Munro v. Socialist Workers Party*, [479 U.S. 189, 195-196 (1986)] ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights").

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997); *Burson v. Freeman*, 504 U.S. 191, 208-09 (1992); *see also Libertarian Party v. Munro*, 31 F.3d 759, 764 (9th Cir. 1994) (the Constitution does not require that a state adopt the most efficient system possible; "it need only adopt a system that is rationally related to achieving its goals"). Thus, the Arizona Supreme Court correctly applied *Anderson* in concluding that "[w]hile the Secretary may not need the entire period of time allowed under § 16-351 [sic] [§ 16-341] to complete her duties in every election year, additional time clearly is necessary when electoral challenges and related court proceedings occur." (Pet. App. 11a.)

Similarly, Petitioners' argument that the State's justifications for the June deadline are not sufficient because the former filing deadline for presidential independent candidates was in September lacks merit. First, election challenges have increased. As the Arizona Supreme Court noted, "it was precisely because the law did not allow sufficient time to complete the challenge process

as a practical matter that the Legislature moved the deadline back an additional 15 days in 1999." (Pet. App. 10a-11a.) In fact, the Arizona Supreme Court heard no fewer than seven petition challenges during the 2000 election that took between thirty-seven and sixty-three days to resolve. (*See* Secretary of State's Supplemental Brief, at 10 n.6, *Browne v. Bayless*, No. CV01-0383-pr, Ariz. Supreme Ct., filed February 11, 2002.) Many more challenges were filed. Petitioners even acknowledge the pressure placed on the courts by ballot-access challenges. (Pet. at 14-15). Second, the State's administrative burdens have increased significantly over the past eighty years. For example, early balloting and compliance with the Voting Rights Act play a larger role in Arizona elections.[5] Further, most of the voters in Arizona now vote on optical scan ballots rather than punch card ballots. (*See* Defs.' Answering Brief at 14, *Browne v. Bayless*, No. 1 CA-CV 00-0546, Ariz. Ct. of App., filed March 2, 2001.) Although the printing process for these ballots is lengthy,[6] they have a lower error rate than punch card ballots. (*See* Defs.' Answering Brief at 14-15, *Browne v. Bayless*, No. 1 CA-CV 00-0546, Ariz. Ct. of App., filed March 2, 2001.); *Bush v. Gore*, 531 U.S. 98, 126 n.4 (2000) (Stevens, J., dissenting).

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[5] Arizona became a covered jurisdiction under the Voting Rights Act on November 1, 1972. 40 Fed. Reg. 43746 (September 23, 1975).

[6] In 2000, for example, Maricopa County ordered its optical scan ballot paper on July 1, 2000, shortly after it determined how many candidate slots would appear on the ballot. (Pet. App. 44a.) Petitioners dismiss this administrative task as "trivial" even though the undisputed record established that it was necessary to assure the ballots were printed on time. (*Id.* at 43a-44a.)

Finally, the pre-1993 filing deadline for independent candidates was arguably more burdensome than the current candidate deadline. A candidate had only ten days after the primary election to gather signatures from electors who had neither voted in the primary nor signed another candidate's petition. (*See* Defs.' Answering Brief at 16, *Browne v. Bayless*, No. 1 CA-CV 00-0546, Ariz. Ct. of App., filed March 2, 2001.) Now independents have the same time to gather signatures as party candidates and may obtain signatures from electors who have not signed another nominating petition for the same office regardless of whether they vote in the primary. A.R.S. § 16-341(C). In changing the deadline, the Arizona Legislature relied on testimony that established that the burdens under the then-existing filing deadline were significant. A supporter of Ross Perot, the 1992 independent candidate for President, testified in favor of changing the deadline and stressed the difficulty his group had gathering petition signatures in the ten days following the primary. (*See* Defs.' Answering Brief at 17, *Browne v. Bayless*, No. 1 CA-CV 00-0546, Ariz. Ct. of App., filed March 2, 2001.)

Because the Arizona Supreme Court correctly applied the law in *Anderson* to the facts in this case, there is no reason for this Court to revisit the issue.

2. No Conflict Exists Between the Decision Below and the Decisions of Other Federal Courts Addressing This Issue.

Petitioners do not argue that the decision below conflicts with any other federal or state court decision. They suggest, however, that the decision is an anomaly. It is not.

The decision below is consistent with this Court's ballot access cases decided after *Anderson*. *See Timmons*, 520 U.S. at 364, 369-70 (applying the *Anderson* balancing test to uphold Minnesota's fusion ban because the burden on First Amendment association rights was justified by the State's interests in ballot integrity and political stability); *Burdick*, 504 U.S. 436-37 (applying the *Anderson* test to uphold Hawaii's ban on write-in voting and finding the ban was justified by the State's interests in preserving ballot integrity and "averting divisive sore-loser candidacies"); *Munro*, 479 U.S. at 196 (holding Washington's requirement that a minor-party candidate for partisan office receive at least one percent of all votes cast in the primary election in order to appear on the general election ballot did not violate First Amendment based on the State's interest in avoiding the possibility of unrestrained factionalism).

The decision below is also consistent with other federal court decisions upholding independent petition filing deadlines similar to Arizona's. *See Wood v. Meadows*, 207 F.3d 708, 716 (4th Cir. 2000) (upholding a June deadline for non-presidential independents); *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 74 (3d Cir. 1999) (same); *Campbell v. Hull*, 73 F.Supp. 2d 1081, 1087 (D.Ariz. 1999) (finding that Arizona's prior deadline of June 27 did not, by itself, constitute an impermissible burden on the rights of independent voters); *U.S. Taxpayers v. Smith*, 871 F.Supp. 426, 437 (N.D. Fla. 1993) (upholding a filing deadline for independent presidential candidates of July 15).

Because there is no conflict in the manner that the lower courts have applied *Anderson*, there is no reason for this Court to revisit the issue.

3. Arizona's June Filing Deadline for Independent Candidates Has Not Prevented Truly Independent Candidates and Candidates from Non-Major Parties from Obtaining Ballot Access.

Browne's historical argument about the importance of independent candidacies for president far from establishes that Arizona's filing deadline interferes in any way with these candidacies. (Pet. at 13.) To the contrary, candidates representing views outside the "major political parties" have had little problem obtaining ballot access in Arizona. Although no "independent" has run for president in Arizona since the filing deadline was moved to June in 1993, individuals such as Ross Perot, Pat Buchanan, and Ralph Nader, whom Petitioners include in the category of independents or "non-major party" candidates, have easily obtained ballot access in Arizona by simply establishing new parties.[7] *See Burdick,* 504 U.S. at 436-37 (holding that Hawaii's system for ballot access, which included laws recognizing new parties similar to those in Arizona, provided for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary and concluding that "any burden on voters' freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary").

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[7] In Arizona, Ross Perot was the 1996 nominee of the newly recognized Reform Party (*see* Arizona Sec'y of State, 1996 Election Canvass, available at http://www.sosaz.com/election/1996/General/Canvass1996GE.pdf); Ralph Nader was the 1996 and 2000 nominee of the Green Party (*id.*; Arizona Sec'y of State, 2000 Election Canvass, available at http://www.sosaz.com/election/2000/General/Canvass2000GE.pdf); and Pat Buchanan was the 2000 nominee of the Reform Party. (*Id.*)

Moreover, contrary to Petitioners' assertion, it is far from "virtually impossible for a reasonably diligent independent candidate to secure access to the Arizona ballot." (Pet. at 14.) Many candidates have obtained ballot access as "independents" for state offices by filing their petitions by the June deadline, including four candidates that appeared on the November 5, 2002 general election ballot. (*See* Defs.' Answering Brief at 9-10, *Browne v. Bayless*, No. 1 CA-CV 00-0546, Ariz. Ct. of App., filed March 2, 2001; Arizona Sec'y of State, 2002 Ballot, available at http://www.sosaz.com/election/2002/General/FullListing.htm.) The candidates obtained a specific number of signatures and submitted them to the relevant county recorder for verification no later than 140 days prior to the primary election. A.R.S. §§ 16-311, -801 and -803.

Because Petitioners have not shown that Arizona's petition filing deadline interferes with the ability of national candidates outside of the major parties to obtain ballot access, there is no need to grant a review.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

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